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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

SHUMONTE WHITE,

Defendant and Appellant.

B275585

Los Angeles County
Super. Ct. No. NA094007

APPEAL from a judgment of the Superior Court of Los Angeles County, James D. Otto, Judge. Affirmed with directions. Fay Arfa for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez, Steven E. Mercer and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant Shumonte White of second degree murder after he stabbed and killed Carlos Gamboa. The trial court sentenced defendant to a term of 15 years to life in prison. On appeal, defendant argues insufficient evidence supports his conviction for second degree murder and the court erroneously denied his *Batson/Wheeler* motion¹ alleging the People exercised a peremptory challenge to a prospective juror based on the prospective juror's race. Defendant also raises numerous claims of evidentiary error and ineffective assistance of counsel. We affirm with directions to correct an error in the abstract of judgment.

PROCEDURAL BACKGROUND

In September 2013, the People charged defendant with the willful, deliberate, and premeditated murder of Gamboa (Pen. Code,² § 187, subd. (a)). The People alleged defendant personally used a deadly and dangerous weapon, a knife, during the commission of the offense (§ 12022, subd. (b)(1)).

A jury convicted defendant of second degree murder and found true the allegation that he personally used a knife to commit the murder. The trial court struck the personal use of a knife allegation and sentenced defendant to a term of 15 years to life in prison.

¹ *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

² All undesignated statutory references are to the Penal Code.

Defendant filed a timely notice of appeal.³

FACTUAL BACKGROUND

The People's Case-in-Chief

1. The Stabbing

In November 2012, defendant lived in an apartment in San Pedro with several roommates. Around 3:45 p.m. on November 16, 2012, defendant's neighbors heard Gamboa outside their homes shouting and striking at passing cars. Gamboa was yelling, "Fuck Wilmington," "Fuck Harbor City," and "Fuck San Pedro." Some neighbors thought Gamboa was acting "crazy" and appeared to be under the influence of alcohol or drugs. Gamboa, who was shirtless, had a large "H.A." tattooed on his back.

Defendant approached Gamboa. After the two started arguing, Gamboa tried to hit defendant. Defendant then started to walk away but Gamboa followed him. Gamboa yelled to defendant, "I'm from the Harbor area," to which defendant responded, "I don't give a fuck. ... Fuck your city."

At some point, defendant and Gamboa started fighting. Several neighbors witnessed the fight. One neighbor, Jasmin Marquez, described the fight as "a lot of punching [and a] lot of wrestling." Defendant got on top of Gamboa and, while pushing Gamboa's chest against the pavement, started punching Gamboa. Eventually, defendant "sort of dropped it," and Gamboa got on

³ Defendant also filed a petition for habeas corpus, raising three claims of ineffective assistance of counsel that are identical to claims raised in his direct appeal. We ordered defendant's writ petition to be considered at the same time as this appeal. We have denied the petition in a separate order.

top of him and started “beating him up.” At some point during the fight, Gamboa bit defendant’s left arm. According to Marquez, both defendant and Gamboa looked like “willing participants,” and neither defendant nor Gamboa appeared to engage in “defensive-type” moves.

After defendant and Gamboa fought for a few minutes, defendant left the scene. As he walked away, defendant told Gamboa, “This isn’t over” and “I’m going to get you back, mother fucker.”

Around 3:50 p.m., defendant returned to his apartment. He yelled for his roommates to call 911, claiming Gamboa had attacked him. Defendant paced around his bedroom, complaining he was afraid he would get sick because Gamboa had bitten him. After several minutes, defendant grabbed a knife with a three- to four-inch blade and left the apartment to confront Gamboa again.

Carrying the knife, defendant walked “angrily” toward Gamboa and said, “Come here, I got something for you. Come here, I got something for you.” Gamboa and defendant fought again before defendant stabbed Gamboa in the abdomen with his knife. After stabbing Gamboa, defendant walked away and tried to conceal the knife under his shirt. As he walked away, defendant said to Gamboa, “That’s what you get, mother fucker.”⁴

After defendant left the fight, Gamboa tried to walk to the sidewalk but collapsed in the street, clutching his stomach. Gamboa had a wound near his abdomen through which his intestines had become exposed. Robert Cormier, one of the neighbors who witnessed the altercation, tended to Gamboa until

⁴ At trial, defendant stipulated that he was the person who stabbed Gamboa.

paramedics arrived. Gamboa died at the hospital while undergoing emergency medical treatment for his wounds. The cause of death was a three-and-a-half- to four-inch stab wound to the abdomen.

2. The Investigation

Defendant returned to his apartment around 4:00 p.m. Phillip Sambrano, one of defendant's roommates, saw defendant enter the apartment carrying a knife. Sambrano heard defendant tell Eddie Smith, one of their other roommates, that defendant "had stabbed a guy." Defendant gave Smith the knife he used to stab Gamboa and left the apartment a few minutes later.

After leaving his apartment, defendant went to the same hospital where the paramedics had taken Gamboa. Defendant sought treatment for the bite wound Gamboa had inflicted on him during their initial fight. Defendant was apprehended by law enforcement at the hospital. Defendant admitted to the arresting officers that he had stabbed someone in San Pedro.

At the police station, defendant was interviewed by Officer Boris Oliva and a Detective Rodriguez of the Los Angeles Police Department. Oliva examined defendant's upper body for any wounds or injuries he may have suffered during the altercation with Gamboa. The only injury Oliva observed on defendant's body was a bite mark on defendant's left arm; Oliva did not observe any injuries on defendant's body, face, head, back or shoulders.

During his interview with Oliva and Rodriguez, defendant admitted he stabbed Gamboa during their fight. Defendant initially told the officers he had been carrying the knife when he and Gamboa first confronted each other and that he stabbed Gamboa during the same fight when Gamboa bit his arm. However, after Oliva told defendant he thought defendant was

lying about the sequence of events surrounding the altercation with Gamboa, defendant admitted that Gamboa had bitten his arm during their first fight, before defendant went to his apartment to retrieve the knife. Specifically, defendant admitted that he left the fight after Gamboa bit him, went to his apartment to retrieve the knife, and returned to the street “to say something to [Gamboa],” with the knife in his hand “open and ready to go.” Defendant told the officers he stabbed Gamboa after they started fighting the second time. Defendant claimed, however, that when he approached Gamboa the second time, he did not intend to stab Gamboa. Rather, defendant intended only to scare Gamboa into leaving the neighborhood.

3. Impeachment of Robert Cormier

Cormier testified that he had suffered a “prior moral turpitude felony conviction,” and that he has mixed feelings about law enforcement. When law enforcement responded to the scene of the stabbing, Cormier provided a brief description of what he witnessed of defendant and Gamboa’s altercation, but he told the officers that he did not want to be involved in the investigation. Cormier moved away from the neighborhood after the altercation.

Cormier spoke to one of defendant’s investigators about the incident about three years before trial. Aside from when he spoke to police officers shortly after defendant stabbed Gamboa, Cormier did not speak about the incident with law enforcement or anyone from the prosecution team until the middle of February 2015, or less than a month before trial, when he went to the police station “to take care of some business.” Before going to the police station, Cormier had heard from one of his neighbors that someone working with the “D.A.’s Office” was investigating the

crime. Cormier wanted to “do the right thing” and tell the police what he witnessed on November 16, 2012. Cormier didn’t tell anyone that he had heard defendant say “Come here, I’ve got something for you” before stabbing Gamboa until Cormier spoke to law enforcement in February 2015.

Defense Evidence

1. Expert Testimony

In 2010, defendant was attacked in Palmdale by someone carrying a knife or screwdriver; the attacker stabbed defendant six times. In January 2014, Dr. Catherine Scarf, a forensic, clinical, and neuropsychologist, examined defendant. Based on that interview and her observations of defendant, Dr. Scarf concluded that defendant has been suffering from Post-Traumatic Stress Disorder (PTSD) as a result of the 2010 Palmdale incident.

In Dr. Scarf’s opinion, a person who suffers from PTSD can be “very easily aroused, [and become] very angry very eas[il]y” when exposed to an “external cue” or something that resembles the original trauma he experienced. A person who suffers from PTSD may also perceive non-dangerous situations as dangerous situations, or he may perceive a situation that is no longer dangerous as remaining dangerous, even once the threat has dissipated. PTSD affects a person’s ability to “process and make decisions” in stressful situations. Dr. Scarf believed that all these symptoms applied to defendant.

Dr. Scarf also diagnosed defendant with borderline intellectual functioning and cannabis abuse. According to Dr. Scarf, there wasn’t much of a difference between defendant’s intellectual functioning at the time he was 13 years old compared to the time she examined him in 2014. In Dr. Scarf’s opinion,

defendant's borderline intellectual functioning affects his ability to make "good judgment[s]."

2. Defendant's Testimony

Defendant testified at trial. He grew up in Wilmington. Although he was familiar with many of the local street gangs, defendant never joined any of them. Defendant knew that "H.A." stood for "Harbor Area," and that somebody with an "H.A." tattoo was likely a gang member.

On November 16, 2012, defendant worked from 2:30 a.m. until 10:30 a.m. loading 18-wheel trucks. After work, defendant went home and took a nap until 1:00 p.m. or 2:00 p.m. When he woke up, he walked to a Chinese food restaurant a few blocks from his apartment. As he left the restaurant, defendant called his girlfriend, Sade Pinson, and walked to a liquor store across the street.

As defendant left the liquor store, he saw Gamboa standing near the exit. Gamboa started walking in front of defendant as defendant walked back to his apartment. As defendant got close to his apartment, Gamboa asked defendant where he was from. Defendant, who was still on the phone with Pinson, replied that he was from "Memphis, Tennessee." Gamboa claimed he was a "Die City Crip" and that he had just been released from prison. Defendant thought Gamboa was lying about being a "Die City Crip" because defendant saw that Gamboa had an "H.A." tattoo on his back.

Defendant changed directions several times while walking back to his apartment, but Gamboa continued to follow him. Defendant told Pinson that a "weirdo" was following him. Defendant thought Gamboa was "banging" on him because Gamboa had "aggressively" asked defendant where he was from.

Defendant also thought Gamboa was “tweaking” on “crystal meth” because Gamboa was “really fidgety,” he kept moving his head like it was “on a swivel,” and he wouldn’t stop talking.

When defendant got close to his apartment, his 16-year-old neighbor “Nick” drove up. Gamboa started talking to Nick and tried to pull him out of his car. When defendant got between Gamboa and Nick, Gamboa said to Nick, “let’s jump this fucking nigger.” Gamboa then swung at defendant, grabbed a pair of headphones off of defendant’s head, and smashed the headphones on the ground.

Defendant and Gamboa started fighting. Defendant thought he “whoop[ed]” Gamboa, but Gamboa kept coming at defendant. Gamboa eventually fell to the ground and defendant kept punching him. At some point, Gamboa jumped up, grabbed defendant’s arm, and “bit the life” out of defendant. Defendant punched the back of Gamboa’s head, but Gamboa wouldn’t let go of defendant’s arm. Defendant thought Gamboa was able to withstand so many punches because he was “under the influence.”

Once Gamboa stopped biting him, defendant gathered some of his belongings and went to his apartment. Defendant couldn’t remember whether he told Gamboa he would come back to the fight. When defendant got back to his apartment, he told his roommates that someone had bitten and robbed him, and he asked them to call the police. He then grabbed a knife, left the apartment, and went back to confront Gamboa. Defendant claimed he didn’t plan on killing or stabbing Gamboa, but that he only brought the knife to scare Gamboa into leaving the neighborhood.

Defendant walked toward Gamboa with his knife open and exposed. Defendant said to Gamboa, “Come here, come here, come here.” Gamboa then “charged” at defendant, and defendant reacted by swinging the knife, stabbing Gamboa in the stomach.

After he stabbed Gamboa, defendant walked back to his apartment. Defendant testified that when he got back to his apartment, he felt “pure adrenaline,” had “tunnel vision,” and was feeling “dazed and confused.” Defendant gave Smith the knife and told Smith to dispose of it. Defendant then fled from the apartment.

When questioned about his interview with the police, defendant admitted that he had initially lied to the officers about the sequence of events leading up to him stabbing Gamboa. He claimed he had lied because he was scared and panicked. Defendant decided to tell the officers the truth when they told him they had spoken to other people who had witnessed his fight with Gamboa.

DISCUSSION

1. Sufficiency of the Evidence to Support Defendant’s Conviction for Second Degree Murder

Defendant contends insufficient evidence supports his conviction for second degree murder. According to defendant, the evidence establishes he acted under a heat of passion when he attacked Gamboa with the knife. Contrary to the substantial evidence standard that applies to his claim, defendant asks us to “reweigh the evidence and reduce the murder conviction to manslaughter or dismiss the second degree murder charge” and

dismiss the case. As we explain, substantial evidence supports defendant's conviction for second degree murder.⁵

1.1. Standard of Review

When evaluating the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether any rational trier of fact could have found the evidence proved the elements of the crime beyond a reasonable doubt. (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.) We do not reweigh the evidence, nor do we resolve credibility issues or evidentiary conflicts. (*Ibid.*) Instead, we draw all reasonable inferences in favor of the judgment. (*Ibid.*) We apply this standard whether direct or circumstantial evidence is involved. (*People v. Avila* (2009) 46 Cal.4th 680, 701.) If the circumstances reasonably justify the trier of fact's findings, we cannot reverse the judgment even if we believe contrary findings could have been made based on the same evidence. (*People v. Cravens* (2012) 53 Cal.4th 500, 508.) Therefore, before we may set aside the judgment, it must be clear that “ ‘ ‘upon no hypothesis whatever is there sufficient substantial evidence to support [it].” ’ ” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

1.2. Substantial evidence supports defendant's conviction for second degree murder.

“ ‘ ‘Homicide is the killing of a human being by another” ’ [Citation.]” (*People v. Beltran* (2013) 56 Cal.4th 935, 941 (*Beltran*)). Criminal homicide is divided into two categories:

⁵ Besides first degree and second degree murder, the jury was instructed on voluntary manslaughter and self-defense.

murder and manslaughter. (*Ibid.*) Murder is a killing performed with malice aforethought. (§ 187.) Malice may be express or implied. (§ 188.) “Express malice is an intent to kill. [Citation.] Implied malice does not require an intent to kill. Malice is implied when a person willfully does an act, the natural and probable consequences of which are dangerous to human life, and the person knowingly acts with conscious disregard for the danger to life that the act poses.” (*People v. Gonzalez* (2012) 54 Cal.4th 643, 653.) While first degree murder requires the defendant to act willfully, deliberately, and premeditatedly with an intent to kill, second degree murder requires only that the defendant act with malice. (*Beltran*, at p. 942.)

“Manslaughter is a lesser included offense of murder.” (*Beltran*, *supra*, 56 Cal.4th at p. 942.) “A person who kills without malice does not commit murder.” (*Ibid.*) An unlawful killing is committed without malice and constitutes manslaughter if the defendant committed the killing in a heat of passion or through imperfect self-defense. (*People v. Blacksher* (2011) 52 Cal.4th 769, 832.)

To qualify as voluntary manslaughter committed in a heat of passion, “the killing must be ‘upon a sudden quarrel or heat of passion’ (§ 192); that is, ‘suddenly as a response to the provocation, and not belatedly as revenge or punishment.’ ” (*People v. Daniels* (1991) 52 Cal.3d 815, 868.) “Heat of passion arises if, ‘ “at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.” ’ [Citation.]” (*Beltran*, *supra*, 56 Cal.4th at p. 942.) If “ ‘sufficient time has elapsed for the

passions of an ordinarily reasonable person to cool,’ ” the killing is murder, not voluntary manslaughter. (*Daniels*, at p. 868.)

Substantial evidence supports defendant’s conviction for second degree murder. First, defendant does not dispute that he stabbed Gamboa. He stipulated that he stabbed Gamboa and admitted that fact to the police shortly after he was arrested and when he testified at trial.

Second, there was overwhelming evidence to support a finding that defendant acted with at least implied malice when he stabbed Gamboa. Immediately after defendant’s and Gamboa’s first fight, but before defendant stabbed Gamboa, Marquez heard defendant tell Gamboa that “this isn’t over,” and Christopher R., another one of defendant’s neighbors, heard defendant tell Gamboa he was “going to get [Gamboa] back,” as defendant walked back to his apartment. Defendant told the police that after he returned to his apartment, he decided to retrieve a knife and confront Gamboa a second time. Marquez, defendant’s neighbor, saw defendant “angrily” walk back toward Gamboa while carrying a knife, and defendant admitted that he opened the knife and told Gamboa to “come here” as he approached Gamboa the second time. Defendant admitted that he swung his knife at Gamboa’s stomach after Gamboa tried to punch him, and the evidence shows that defendant penetrated Gamboa’s stomach with the entire, or almost the entire, length of the knife’s blade. What’s more, Christopher R. also heard defendant tell Gamboa, “That’s what you get, mother fucker,” immediately after defendant stabbed Gamboa.

Defendant argues the evidence also supports a finding that he acted in the heat of passion when he stabbed Gamboa. Specifically, defendant claims the evidence establishes that, at

the time he stabbed Gamboa, he was “hyper-vigilant” and acted in a fit of rage in response to Gamboa’s aggressive behavior because defendant’s PTSD “impacted his perceptions.” Defendant contends the jury could have found a reasonable person in his position would not have had sufficient time to cool down between the time he left the altercation to retrieve the knife from his apartment and the time he stabbed Gamboa during their second altercation. This argument lacks merit. Even if we were to assume the evidence could have supported a finding that defendant harbored a different mental state when he stabbed Gamboa, we will not second guess the jury’s credibility determinations or resolution of evidentiary conflicts. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

2. Evidence of Cormier’s Criminal Record and Sex Offender Registration History

Defendant next contends the People violated his due process rights and their obligations under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) to disclose evidence favorable to the accused when they disclosed some, but not all, of Cormier’s prior felony convictions. Specifically, defendant argues the People violated *Brady* because they informed defense counsel that Cormier had suffered a conviction for a felony sex offense without disclosing that Cormier had suffered a second similar conviction. Defendant also complains the court erred when it excluded evidence of the specific nature of Cormier’s underlying felony conviction and precluded defendant from introducing evidence that Cormier went to the police station to register as a sex offender on the day he was interviewed about Gamboa’s murder.

2.1. Relevant Proceedings

In February 2015, Cormier was interviewed by the police about Gamboa's murder. Cormier told the police what he had witnessed during defendant's altercation with Gamboa. Cormier explained he had been on parole for three years because of a sex crime and that he didn't know when he would finish his parole term because of recent changes in the law. Cormier stated he had not spoken to the police since the time of the murder because he was "on parole" for a prior sex crime and did not want to get involved with law enforcement or "deal with all [the] court appearances." Nevertheless, Cormier decided to speak to the police about Gamboa's murder because he had heard defendant's investigator claim that defendant was acting in self-defense at the time he stabbed Gamboa, a characterization of the attack with which Cormier disagreed.

The interviewing officers assured Cormier that it would be safe for him to testify in defendant's case because the case wasn't "really a gang case." The officers also assured Cormier that he would not violate the terms of his parole if he missed a parole obligation because he had to testify at trial. One of the officers told Cormier to give whoever is in charge of administering the terms of Cormier's parole a copy of the officer's business cards so that person could verify that Cormier was participating in a criminal investigation. Before concluding the interview, the same officer told Cormier he was "on the right track" and "doing the right thing" by speaking to the police. The officer told Cormier to "[j]ust go to your classes," "keep registering, [and] don't mess up."

On March 9, 2015, the same day the evidence phase of trial began, the prosecutor notified the court that he intended to add Cormier to the People's witness list. The prosecutor had provided

defense counsel with audio and video recordings of Cormier's February 2015 interview with the police, and the prosecutor had notified defense counsel during the weekend prior to trial that the People intended to call Cormier as a witness. Although defense counsel acknowledged that one of defendant's investigators had interviewed Cormier more than a year before trial, defendant objected to the prosecutor's request to add Cormier to the People's witness list on the grounds it constituted late discovery. The court overruled defendant's objection.

The next day, before calling Cormier to testify, the prosecutor informed the court and defense counsel that Cormier had a criminal record and is a "290 registrant." The prosecutor also stated that Cormier had gone to the police station to register as a sex offender on the day he was interviewed. In response to the prosecutor's disclosures, defense counsel argued defendant should be allowed to impeach Cormier by asking questions about the nature of Cormier's prior conviction and the reason why he went to the police station on the day he was interviewed.

The court ruled that defendant could ask Cormier whether he had been convicted of a felony involving moral turpitude, without going into the details of the underlying conviction or the reason why Cormier went to the police station on the day he was interviewed. The court found the nature of Cormier's underlying conviction and the fact he went to the police station to register as a sex offender were irrelevant.

On November 20, 2015, after retaining new counsel, defendant filed a "Motion To Compel Prosecution Discovery," requesting the court to order the People to disclose, among other things, the following information: (1) Cormier's date of birth; (2) Cormier's criminal history; (3) the history of Cormier registering

as a sex offender; (4) a copy of the police report from Cormier's prior conviction for a sexual offense; and (5) "any information about any benefits that resulted from Cormier's testimony at [defendant's] trial."

On December 1, 2015, the court held a hearing on defendant's discovery motion. The prosecutor claimed he had provided defendant's original counsel with Cormier's date of birth and criminal record before or during trial. The prosecutor also claimed he had provided defendant's original counsel with a copy of Cormier's rap sheet during trial, but offered to provide defendant's new attorney with a copy of the rap sheet. The court responded, "That's in the record. No." Nevertheless, the court ordered the People to "turn over" to defendant information concerning Cormier's prior conviction.

The court denied defendant's request for disclosure of police reports related to Cormier's prior convictions and any information addressing Cormier's history of registering as a sex offender. As to information concerning any benefits Cormier may have received for serving as a witness at defendant's trial, the court concluded no such evidence existed because there had been no "side agreement" or "1332" as to Cormier.

On March 24, 2016, defendant filed a motion to dismiss or for a new trial, arguing, among other things, that the People violated his due process rights and their disclosure obligations under *Brady* by failing to fully disclose Cormier's criminal history. Specifically, defendant asserted that while the People disclosed that Cormier was a "290 registrant" and had suffered one prior felony conviction for a crime of moral turpitude, the People failed to disclose: (1) that Cormier had suffered a second felony conviction; (2) the specific nature of both of Cormier's prior

convictions; and (3) the fact that Cormier was on parole at the time he testified in defendant's case. Defendant also argued the court erred in excluding evidence that Cormier had gone to the police station in February 2015 to register as a sex offender. Defendant attached to his motion an exhibit containing several court documents from two criminal proceedings against Cormier⁶ and a transcript of Cormier's February 2015 interview with the police.

On June 14, 2016, the court denied defendant's motion. With respect to defendant's claims concerning the disclosure and admission of information relating to Cormier's criminal history, the court noted that it recalled an "off the record" discussion before Cormier was called to testify during which the prosecutor disclosed that Cormier had suffered multiple prior felony convictions. The court found the People did not violate *Brady* when it disclosed Cormier's criminal history because defendant's prior counsel could have "pursue[d] the matter more," but for "whatever reason, he elected not to." The court also found that it had properly excluded evidence of the specific nature of Cormier's underlying convictions because the inflammatory nature of the

⁶ The documents from Cormier's prior criminal proceedings revealed the following information. In January 2004, the People charged Cormier with aggravated sexual assault of a child by oral copulation (§ 269, subd. (a)(4)) and commission of a lewd act upon a child (§ 288, subd. (a)). In February 2004, Cormier pled no contest to commission of a lewd act upon a child. The court dismissed the charge of aggravated sexual assault of a child, sentenced Cormier to six years in prison, and ordered Cormier to register with local law enforcement as a sex offender under section 290. Also in February 2004, the People charged Cormier with forcible oral copulation (§ 288A, subd. (c)(2)). In March 2004, Cormier pled no contest to forcible oral copulation, and the court sentenced him to three years in prison.

underlying sexual offenses outweighed the probative value such information may have had in impeaching Cormier's credibility.

2.2. Defendant Has Not Established a *Brady* Violation

Defendant contends the People violated his due process rights and their disclosure obligations under *Brady* because they failed to disclose before trial that Cormier had suffered a second prior felony conviction for a sexual offense. Defendant insists that had he been able to introduce Cormier's second felony conviction, the jury likely would have disregarded Cormier's testimony as unreliable. In turn, defendant argues, he likely would have obtained a more favorable verdict because Cormier was a critical witness to the People's case-in-chief. As we explain, defendant cannot establish a violation of *Brady* because, even if we were to assume the People failed to disclose evidence that could have been used to further impeach Cormier, he has not shown that evidence was material.

The prosecution violates a defendant's due process rights when it suppresses, intentionally or unintentionally, evidence favorable to the defendant "where the evidence is material either to guilt or to punishment" (*Brady, supra*, 373 U.S. at p. 87.) The prosecution, therefore, has a duty to disclose all material evidence that reasonably appears favorable to the defendant. (*In re Sassounian* (1995) 9 Cal.4th 535, 543 (*Sassounian*).) This duty exists regardless of whether the defendant makes any request for such evidence to be disclosed. (*Kyles v. Whitley* (1995) 514 U.S. 419, 432.)

Favorable evidence for purposes of *Brady* includes evidence that is exculpatory to the defendant as well as evidence that is damaging to the prosecution, such as evidence that impeaches a government witness. (*United States v. Bagley* (1985) 473 U.S.

667, 676; see also *Sassounian* 9 Cal.4th at p. 544; *People v. Uribe* (2008) 162 Cal.App.4th 1457, 1471–1472.) “Impeachment evidence” is any evidence that “may make the difference between conviction and acquittal.” (*Bagley*, at p. 676.) Evidence is material “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” (*Id.* at p. 682.)

There are three components to a *Brady* violation: (1) the evidence at issue is favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence must have been suppressed by the government, either willfully or inadvertently; and (3) the suppression of the evidence must have prejudiced the defendant. (*Strickler v. Greene* (1999) 527 U.S. 263, 281–282.) The defendant carries the burden of showing on appeal that there is a reasonable probability of a different result in the trial court had the evidence at issue not been suppressed. (*Banks v. Dretke* (2004) 540 U.S. 668, 699.)

“We independently review the question whether a *Brady* violation has occurred, but give great weight to any trial court findings of fact that are supported by substantial evidence.” (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 176 (*Letner and Tobin*).)

There is no dispute that the first element of a *Brady* claim is satisfied in this case. Evidence that Cormier had suffered multiple prior felony convictions for sexual offenses is impeachment evidence that would have a tendency to undermine Cormier’s credibility. (See *People v. Rowland* (1992) 4 Cal.4th 238, 259, fn. 1 [“convictions for sodomy, lewd conduct, and oral

copulation [manifestly] ... involve[] moral turpitude”]; *People v. Massey* (1987) 192 Cal.App.3d 819, 823 [“It is well established that child molesting in California law is a crime of moral turpitude for impeachment and other purposes.”].) We need not decide, however, whether the second element—suppression of favorable evidence by the People—is satisfied because defendant has not established that evidence of Cormier’s second felony conviction was material.

“ ‘ “In general, impeachment evidence has been found to be material where the witness at issue ‘supplied the only evidence linking the defendant(s) to the crime’ [citations], or where the likely impact on the witness’s credibility would have undermined a critical element of the prosecution’s case, [citation].” ’ [Citation.]” (*Letner and Tobin, supra*, 50 Cal.4th at p. 177.) Defendant cannot show evidence of Cormier’s second felony conviction satisfies either of these standards.

First, Cormier was not the only witness whose testimony helped establish the elements of defendant’s murder conviction. As noted in our factual summary, several witnesses aside from Cormier testified about the events leading up to, and including, defendant’s stabbing of Gamboa. Each of those witness’s testimony, including defendant’s testimony, linked defendant to Gamboa’s murder. Second, even if we were to assume the jury would have disregarded all of Cormier’s testimony had it heard evidence that Cormier had suffered a second felony conviction, the absence of Cormier’s testimony would not have undermined a critical element of the People’s case against defendant.

Marquez, one of defendant’s neighbors, witnessed the entirety of defendant’s and Gamboa’s initial fight. She described defendant as a “willing participant” in that fight, and she heard

defendant tell Gamboa “[t]his isn’t over” as defendant walked away from that fight. Marquez also saw defendant carrying a knife as he approached Gamboa shortly before defendant stabbed him. Christopher R. heard defendant threaten Gamboa as defendant walked away from the first fight, and he heard defendant say, “That’s what you get, mother fucker” after stabbing Gamboa. In addition, Christopher R. saw defendant try to conceal the knife after he stabbed Gamboa. Finally, defendant testified that he retrieved the knife after the first fight, that he openly carried the knife as he approached Gamboa the second time, and that he told Gamboa “come here” before stabbing him.

In sum, defendant cannot establish that the People violated *Brady* by failing to disclose Cormier’s second felony conviction because defendant has not shown Cormier’s impeachment evidence was material.⁷

⁷ For the same reasons we just discussed, defendant cannot show he suffered any prejudice from the trial court’s rulings sanitizing Cormier’s criminal record and excluding evidence that Cormier had reported to the police station in February 2015 to register as a sex offender. Accordingly, we need not determine whether the court erred in making those evidentiary rulings. (See *People v. Houston* (2005) 130 Cal.App.4th 279, 295 (*Houston*) [unnecessary for reviewing court to reach the merits of the defendant’s claims that the court erred in excluding certain evidence where, even if the reviewing court were to assume the evidentiary rulings were erroneous, any error was harmless].)

3. Exclusion of Evidence of Defendant's Learning Disability, Gamboa's Drug Use, and Gamboa's Gang Affiliation

Defendant next contends the court deprived him of his right to present a defense by excluding several pieces of evidence that he claims would have supported his defense that he lacked malice when he stabbed Gamboa. Specifically, defendant contends the court erred in excluding the following evidence: (1) a post-mortem toxicology report showing Gamboa tested positive for methamphetamine at the time of his death; (2) expert testimony about the effects of methamphetamine use; (3) expert testimony addressing Gamboa's purported gang affiliation; and (4) testimony from defendant's mother that defendant suffered from a learning disability. As we explain, defendant has failed to show the court committed reversible error in excluding any of these items of evidence.⁸

3.1. Applicable Law

Only relevant evidence is admissible at trial. (Evid. Code, § 350.) “ ‘Relevant evidence’ ” is “evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed

⁸ The People contend defendant forfeited his claims that the court's evidentiary rulings violated his constitutional rights because he did not object to the rulings on constitutional grounds at the time the rulings were made. We conclude defendant did not forfeit his claims on appeal because they “ ‘do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission ... had the additional *legal consequence* of violating the Constitution.’ ” (*People v. Homick* (2012) 55 Cal.4th 816, 856, fn. 25 (*Homick*).)

fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) The trial court has discretion to exclude evidence “if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.) We review a court’s decision to admit or exclude evidence for abuse of discretion, and we will not disturb that decision “except on a showing the ... court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.)

Generally, “ ‘the ordinary rules of evidence do not impermissibly infringe on the accused’s right to present a defense.’ ” (*People v. Jones* (1998) 17 Cal.4th 279, 305.) While a defendant has a due process right to present all relevant evidence that has significant probative value to his defense, he is not entitled to engage in an unlimited inquiry into collateral matters. (*Homick, supra*, 55 Cal.4th at p. 865.) That is to say, the defendant is not entitled to attack a witness’s credibility or to prove another issue relevant to his defense with “time-consuming and remote evidence that was not obviously probative on the question” at issue. (*People v. Dement* (2011) 53 Cal.4th 1, 52, disapproved on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

3.2. Relevant Proceedings

We separately discuss the proceedings surrounding each of the challenged evidentiary rulings.

3.2.1. Defendant's Mother's Testimony

During the defense phase of evidence, the People moved to exclude defendant's mother from testifying about defendant's learning disabilities. The prosecutor argued the mother's testimony concerning "defendant's special education" was cumulative of other evidence and would "go towards sympathy more than anything" in light of the fact that Dr. Scarf had already testified about how defendant's learning disabilities may have affected his ability to make good judgments at the time he stabbed Gamboa. Defense counsel opposed the People's request, arguing the court should allow defendant's mother to testify about defendant's learning disabilities because such evidence would reflect on defendant's "ability to cope in life, react to stressful situations, [and] process information," and it would "add additional support and real-life observations to go with Dr. Scarf's testimony." The court granted the People's request to exclude the testimony of defendant's mother, concluding that further testimony on defendant's learning disabilities would "be cumulative [and] unduly prejudicial under [Evidence Code section] 352, and frankly irrelevant and not necessary."

3.2.2. Evidence of Gamboa's Gang Affiliation

Prior to trial, defendant requested the People disclose any information concerning Gamboa's "gang file and gang profile." Defense counsel argued evidence that Gamboa was affiliated with a gang would be relevant to an imperfect self-defense or heat-of-passion defense, because such evidence would corroborate defendant's claim that he was fearful of Gamboa at the time defendant stabbed him. The prosecutor responded that he was not aware of any evidence of Gamboa's gang affiliations because

the People had not investigated the issue. The prosecutor also disputed whether such evidence would be relevant since the People did not believe the case was gang related.

The court denied defendant's request for an order requiring the People to conduct discovery into Gamboa's gang ties. While the court agreed that whether defendant believed Gamboa was a gang member would be relevant to defendant's state of mind at the time he stabbed Gamboa, the court did not believe that evidence establishing Gamboa actually was a gang member, or whether other witnesses believed Gamboa was a gang member, would be relevant to any issue at trial. The court reasoned defendant could establish whether he believed Gamboa was a gang member based on defendant's observations of Gamboa before and during their altercation, such as by introducing evidence that defendant saw Gamboa had an "H.A." tattoo on his back and heard Gamboa make gang-related statements. Later, during the People's case-in-chief, the court precluded defendant from questioning a police officer who responded to the scene of the stabbing whether he knew if the letters "H.A." were associated with a criminal street gang.

3.2.3. Evidence of Gamboa's Drug Use

Before trial, defendant sought to admit evidence that Gamboa's post-mortem toxicology report revealed Gamboa had 450 nanograms per milliliter of methamphetamine in his system at the time he died. Defendant argued such evidence would help corroborate his defense that he acted in imperfect self-defense or out of a heat of passion at the time he stabbed Gamboa. The court took defendant's request under submission.

After the People rested, the court denied defendant's request to admit the results of Gamboa's post-mortem toxicology

report. The court also denied defendant's request to present expert testimony addressing the symptoms that a person may experience from having 450 nanograms per milliliter of methamphetamine in his or her system. The court reasoned such evidence would be unduly prejudicial under Evidence Code section 352, especially in light of the fact that the People did not dispute during their case-in-chief that Gamboa was the initial aggressor or that some of the witnesses to the stabbing thought Gamboa was under the influence of drugs when he confronted defendant.

3.3. Any Error Was Harmless Beyond a Reasonable Doubt

We need not determine whether the court erred in excluding defendant's mother's testimony addressing defendant's learning disabilities, evidence of Gamboa's drug use, and evidence of Gamboa's gang affiliation because, even if we were to assume it was error of a constitutional dimension to exclude such evidence, any error was harmless beyond a reasonable doubt. "We assess federal constitutional errors under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). Under *Chapman*, we must reverse unless the People 'prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' (*Ibid.*)" (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165–1166.) That burden is met here.

First, there was overwhelming evidence to support defendant's conviction for second degree murder. As we discussed above, several neighbors witnessed the events leading up to, and including, the moment defendant stabbed Gamboa. Each of their accounts are entirely consistent with a finding that defendant acted with malice when he stabbed Gamboa.

Second, the evidence the court excluded—defendant’s mother’s testimony about his learning disabilities; evidence of Gamboa’s gang ties; Gamboa’s post-mortem toxicology report confirming Gamboa had methamphetamine in his system at the time of death; and expert testimony about the effects of methamphetamine use—would have been cumulative of other evidence admitted at trial that addressed the same factual issues. For example, any testimony defendant’s mother could have provided addressing defendant’s learning disabilities would have been cumulative of Dr. Scarf’s testimony that defendant had been diagnosed with borderline intellectual functioning and that his learning disability likely affected his ability to make “good judgment[s]” at the time he stabbed Gamboa. Defendant does not allege his mother would have testified to any facts outside those addressed by Dr. Scarf’s testimony.

As for evidence of Gamboa’s purported gang affiliation and expert testimony on the meaning of “H.A.” and the various gang-related statements Gamboa made before and during his altercation with defendant, such evidence would have been cumulative of other evidence introduced by the People and defendant. For instance, the People introduced evidence that neighbors saw Gamboa had “H.A.” tattooed on his back and heard him shout names that were associated with local criminal street gangs before and during his altercation with defendant. And defendant testified that: (1) he was aware Gamboa was shouting the names of local street gangs before and during their confrontation; (2) he saw that Gamboa had “H.A.” tattooed on his back; (3) he believed that someone who had an “H.A.” tattoo was likely a gang member; and (4) he believed that Gamboa was “banging” on him before they started fighting based on Gamboa’s

demeanor and statements. The jury therefore heard ample evidence that was consistent with defendant's claim that he acted out of fear for his safety when he stabbed Gamboa because he believed Gamboa was a gang member.

And finally, evidence of the results of Gamboa's toxicology report and expert testimony on the effects of methamphetamine use also would have been cumulative of other evidence presented at trial. Several neighbors who witnessed the events surrounding the stabbing testified that Gamboa appeared to be under the influence of drugs. In addition, defendant testified that he thought Gamboa was "tweaking" on "crystal meth" at the time they confronted each other.

In light of the foregoing, we conclude beyond a reasonable doubt that defendant would not have obtained a more favorable verdict had the trial court admitted additional evidence of defendant's learning disability, Gamboa's drug use, and Gamboa's alleged gang affiliation.

4. Admission of 911 Recordings

Defendant argues the court erred in excluding recordings of two 911 calls made shortly before and after he stabbed Gamboa. In the first call, an unidentified male told the 911 operator that one of his roommates "just came inside—came—came rushing inside the house ... yelling for me to call 911 fast. [¶] ... [¶] Something serious—something seriously just happened just now and I don't know what it is." In the second call, an unidentified female caller told the 911 operator the victim has "been ranting and raving in the streets" and that she (the caller) was afraid to approach the victim because he was "saying he hates niggers and stuff like that. So I would approach him, I have no problem, but I don't know if he's going to try to hurt me." Defendant argues the

recordings of the two 911 calls were admissible as “excited utterances” because they were made within several minutes of Gamboa’s stabbing, at a time when the callers were “still excited.” (See *People v. Poggi* (1988) 45 Cal.3d 306, 318 [extrajudicial statements are admissible as excited utterances where: “(1) there [was] some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance [was made] before there ha[d] been time to contrive and misrepresent ...; and (3) the utterance ... relate[s] to the circumstance of the occurrence preceding it”].)

Defendant acknowledges, however, that the court never made a ruling excluding either of the calls he claims should have been admitted. Indeed, the record shows that before the court ruled on the admissibility of the recordings, defendant’s trial counsel stated he only wanted to introduce the recording of a 911 call made by defendant’s roommate, Eddie Smith, in which defendant could be heard shouting in the background.⁹ As for the recordings of several other 911 calls made around the time of the stabbing, defense counsel agreed to stipulate to a statement informing the jury of the time those calls were placed and the identity of the people who made the calls. That stipulation was read to the jury. Because the record does not show the court excluded any of the recordings of the 911 calls defendant claims

⁹ Smith’s call was played for the jury while defendant testified. Defendant confirmed he was inside his apartment at the time Smith placed the call, and he confirmed that his voice could be heard in the call’s recording shouting for his roommates to call 911. The court admitted the recording of Smith’s 911 call into evidence.

should have been admitted, defendant's claim that the court erred in excluding those calls necessarily fails.

Defendant argues in the alternative that if the court never excluded the recordings of the 911 calls, his trial counsel was ineffective for failing to admit them. To establish a claim for ineffective assistance of counsel, a defendant must satisfy two requirements. (*Strickland v. Washington* (1984) 466 U.S. 668, 690–692.) First, the defendant must establish his attorney's conduct fell "outside the wide range of professionally competent assistance." (*Id.* at p. 690.) Second, the defendant must show there is a reasonable probability that but for his attorney's conduct, the result of the trial would have been more favorable to the defendant. (*Id.* at p. 694.) " "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ' [Citation.]" (*In re Crew* (2011) 52 Cal.4th 126, 150 (*Crew*).) Defendant cannot establish his claim for ineffective assistance of counsel because it is not reasonably probable he would have received a more favorable verdict had the jury heard the recordings of the 911 calls he claims should have been introduced.

Defendant asserts trial counsel should have introduced the recordings of the two 911 calls because the callers' statements "corroborated [defendant's] version of events." Defendant fails to explain in his opening brief, however, why those statements would have corroborated any aspect of his defense or how they would have in any way affected the outcome of the trial. Although defendant attempts in his reply brief to elaborate why the recording of the unidentified female's 911 call would have corroborated his defense, he fails to even mention the recording of the unidentified male's 911 call. Because defendant fails to

explain how he was prejudiced by his counsel's failure to admit the recording of the 911 call made by the unidentified male, his claim of ineffective assistance of counsel as it relates to that call fails.

As for the recording of the 911 call made by the unidentified female, defendant claims her statements corroborated aspects of defendant's testimony—specifically, that Gamboa expressed “anti-Black sentiments and that, even after the incident when Gamboa was incapacitated, the caller was afraid to approach Gamboa.” Both the People and defendant introduced a significant amount of evidence showing that, leading up to and throughout defendant's and Gamboa's altercation, Gamboa behaved aggressively and erratically and appeared to be under the influence of drugs. In addition, defendant was able to testify that Gamboa expressed anti-Black sentiments before they started fighting, and the People never disputed that Gamboa made such statements. The recording of the unidentified female's call would have therefore been cumulative of other evidence that addressed issues the People did not dispute. Consequently, defendant was not prejudiced by counsel's decision not to introduce the recording of that call.

5. Admission of Police Officer Opinion Testimony

Defendant next contends the court violated his due process rights and deprived him of a fair trial by allowing Oliva, one of the police officers who interviewed defendant, to opine that defendant did not tell the truth during parts of his post-arrest interview. Specifically, defendant argues the court erred in allowing Oliva to testify that he believed there were numerous inconsistencies in defendant's account of the stabbing. Defendant also contends his trial counsel rendered ineffective assistance by

failing to object to those portions of Oliva's testimony. Finally, defendant argues the court prejudicially erred by failing to instruct the jury with CALCRIM No. 333, which addresses how the jury may consider opinion testimony from lay witnesses. Each of these claims lacks merit.

5.1. Relevant Proceedings

During the People's case-in-chief, the prosecutor asked Oliva several questions about whether Oliva believed defendant had lied during the post-arrest interview about the circumstances surrounding the altercation with Gamboa. For example, the prosecutor asked Oliva whether he had "reason to believe that some of the things [defendant] was telling [Oliva] were untrue[.]" Oliva responded, "Yes, sir. The[re] were inconsistencies in his first version of what took place that evening with Mr. Gamboa."

Later, when the prosecutor asked Oliva whether defendant told the officers that the entire altercation between him and Gamboa occurred during a single fight, Oliva replied, "Yes, all in one fight. [¶] The inconsistency that I noted also was the fact that after he described the stabbing, he said, oh, I forgot to tell you about the bite. He left all that out, and he realized that I saw the expression on his face. When I caught him, he came back to explain—he came back to say that he had stabbed [Gamboa] after the fight. ..." Oliva also testified that defendant had clarified during the interview that he had left the initial fight to retrieve the knife: "Yes. That was once we confronted him about the inconsistencies."

In explaining why he and Rodriguez "confronted" defendant during the interview, Oliva responded, "Because we had already interviewed four other people, and two people gave us the information. ... [A]nd we [already had] information that

everything that the witnesses were saying [was] accurate. They were all interviewed separately. [¶] So when [defendant] was telling us his version, there were inconsistencies. There was some truth to it as far as the fight and everything else, but the time of the stabbing was off.” Finally, Oliva explained in detail why he believed defendant’s body language throughout the interview suggested that defendant was lying about the sequence of events surrounding his altercation with Gamboa. Defendant did not object to any of Oliva’s statements about the inconsistencies Oliva identified in defendant’s account of the altercation or Oliva’s description of defendant’s demeanor during his post-arrest interview.

After both parties rested, the court instructed the jury with CALCRIM No. 333. Specifically, the court instructed the jury as follows: “Witnesses, who were not testifying as experts, gave their opinions during the trial. You may but are not required to accept those opinions as true or correct. You may give the opinions whatever weight you think appropriate. Consider the extent of the witness’s opportunity to perceive the matters on which his or her opinion is based, the reasons the witness gave for any opinion, and the facts or information on which the witness relied in forming that opinion. You must decide whether information on which the witness relied was true and accurate. You may disregard all or any part of an opinion that you find unbelievable, unreasonable, or unsupported by the evidence.”

5.2. Analysis

As a preliminary matter, we dispose of defendant’s argument that the court erred by failing to instruct the jury with CALCRIM No. 333. As the People point out, and as our summary of the relevant proceedings shows, the court *did* instruct the jury

with CALCRIM No. 333. Defendant does not address this argument in his reply brief, nor does he contend any aspect of CALCRIM No. 333 as it was given to the jury was erroneous. This claim therefore lacks merit.

With respect to defendant's claim that the court violated his due process rights and deprived him of a fair trial when it allowed Oliva to opine about whether he believed defendant had lied during the police interview, we need not reach the issue because any error was harmless beyond a reasonable doubt. As we noted in our factual summary, defendant testified that he had lied to Oliva and Rodriguez "about the fights" during his post-arrest interview. Defendant explained that he had lied because he was "scared" and "panicked." In addition, the jury heard excerpts from defendant's interview, in which (1) Oliva asked defendant whether he had lied about the sequence of events surrounding his altercation with Gamboa; and (2) defendant admitted that he had lied about aspects of the altercation, such as when he retrieved the knife he used to stab Gamboa. Defendant does not contend the court erred in admitting any of this evidence. Because the jury heard defendant admit during his testimony and in the excerpts from his post-arrest interview that he had lied to Oliva during that interview, any error in admitting testimony that Oliva also believed defendant had lied during the interview was harmless beyond a reasonable doubt.¹⁰ (See *Houston, supra*, 130 Cal.App.4th at p. 295 [erroneous admission

¹⁰ Because defendant cannot show he was prejudiced by the admission of Oliva's testimony, he cannot establish a claim for ineffective assistance of counsel based on defense counsel's failure to object to that testimony. (See *Crew, supra*, 52 Cal.4th at p. 150.)

of evidence was harmless where evidence of guilt was overwhelming and challenged evidence was cumulative of other properly admitted evidence[.]

6. Admission of Inculpatory Portions of Defendant's Police Interview

Defendant next contends the trial court violated his due process rights and deprived him of a fair trial when it granted the People's request to admit certain segments of the recording of defendant's police interview, while excluding other segments defendant claims were consistent with his testimony at trial and corroborated his defense that he acted in a heat of passion or out of self-defense when he stabbed Gamboa.¹¹ (See *People v. Samuels* (2005) 36 Cal.4th 96, 130 (*Samuels*) [under Evid. Code, § 356, a party may introduce statements "that have some bearing upon, or connection with, the portion of the conversation originally introduced"].) Defendant also claims in passing that his counsel was ineffective for "failing to object," but he fails to identify any specific ruling to which his counsel did not object or explain why counsel's performance was prejudicially deficient.

¹¹ Specifically, defendant claims he should have been allowed to introduce portions of the interview in which he discussed the following details about the underlying altercation: (1) defendant heard Gamboa make racially derogatory statements about defendant and African-Americans before and after defendant stabbed him; (2) defendant heard Gamboa make gang-related statements before defendant stabbed him; (3) defendant believed Gamboa was under the influence of methamphetamine or heroin during their altercation; and (4) defendant believed Gamboa charged at him before he stabbed Gamboa. Defendant also claims defense counsel should have admitted portions of the interview in which defendant told the officers that he worked a "nine to five job" and had never been in trouble with the law.

These arguments lack merit because the court never precluded defendant from playing the segments of the interview recording he claims should have been admitted.

Prior to trial, the People moved to admit portions of the recording of defendant's police interview and question one of the interviewing officers about statements defendant made during that interview. The People also moved to exclude segments of the interview that "don't fall under the rule of completeness," including parts of the interview where defendant "broke down and had some emotional expressions." The People argued those parts of the interview should be excluded because they were "not probative to whether [defendant] actually committed the crime and would only serve to elicit sympathy from the jurors." Defense counsel claimed he should be allowed to question the interviewing officer about the portions of the interview in which defendant became emotional, as well as play those parts of the interview for the jury.

The court conditionally granted the People's request to exclude the parts of the interview in which defendant became emotional, finding they would be irrelevant unless the "People open the door and it's necessary for the rule of completeness" to admit them. The court also found the probative value of those segments of the interview would be outweighed by their prejudicial effect under Evidence Code section 352.

During the People's case-in-chief, Oliva testified about the circumstances of defendant's interview and certain statements defendant made during that interview. The prosecutor played parts of the recording of the interview that corresponded with Oliva's testimony, and the court admitted into evidence the video recording of the interview.

Following Oliva's direct examination, the court informed defense counsel that if he wanted to play other segments of the interview while he cross-examined Oliva, he needed to provide the court with transcripts of those segments of the interview so the court could determine whether they were admissible under the rule of completeness. The court told defense counsel he could not "play things that [he didn't] have a transcript for." The court informed defense counsel, however, that defendant could play his *entire interview* during the defense phase of trial if he testified, so long as defense counsel provided the court with a transcript of the interview by that time.

Defense counsel cross-examined Oliva about defendant's interview. Oliva testified the interview lasted between 45 minutes and an hour and a half. Defense counsel read from, and questioned Oliva about, portions of the interview in which defendant and the officers discussed the details of the events surrounding defendant's and Gamboa's altercation.

During the defense phase of trial, defendant testified about the portions of the interview the prosecutor played for the jury while Oliva testified. During defendant's cross-examination, the prosecutor asked defendant whether he told the police that he confronted Gamboa the second time because he wanted to "get [Gamboa] off the ... street," not because he wanted to stab Gamboa. Defendant told the prosecutor he did make that statement to the interviewing officers, but that the prosecutor had not played that part of the interview when Oliva testified. When the prosecutor asked defendant whether defense counsel "ha[d] the entire interview," defendant replied, "yes." The prosecutor then asked defendant whether defense counsel could

“play whatever he need[ed] to,” to which defendant replied, “if ... you allowed it to be [played].”

The prosecutor objected to defendant’s response, asking the court to admonish the jury that defendant had not been precluded from introducing any relevant portions of his police interview. The court granted the prosecutor’s request and admonished the jury as follows: “Ladies and Gentlemen, so it’s clear, there’s no relevant evidence that the defense has been precluded, that there’s an audio/video transcript of the interview, defendant has been kept from showing the evidence in that transcript. I’m sure his counsel will find it and play it for you.”

Later, during defendant’s re-direct examination, defense counsel and the prosecutor stipulated that defendant had told the officers during his interview that he had intended only to scare Gamboa out of the neighborhood when he approached Gamboa the second time. Defense counsel then read the following statement defendant made during his interview: “I still even though I had it out, and I was ready, I didn’t still charge ‘cause I’m going to be honest, if the man would have turn[ed] around, walked away, I would have walked my ass back away, too. I wasn’t trying—I wasn’t on no trying to chase him and hunt him back down, but he wanted some more. He was feeling himself he was high.” Defendant did not introduce any other parts of his police interview.

As the summary of the relevant proceedings shows, the court never precluded defendant from introducing any part of his police interview he claims should have been admitted. Although the court restricted defendant from cross-examining Oliva about the parts of the interview in which defendant became emotional, the court informed defendant that he could play the recording of

the *entire interview* if he testified. Although defendant testified, he did not introduce any parts of the interview he claims should have been admitted. Because the court did not preclude defendant from introducing any portions of his police interview, there was no error. (See *Samuels, supra*, 36 Cal.4th at p. 130 [no error where trial court informed defendant that she could seek to admit relevant portions of an out-of-court conversation, but defendant failed to do so].) Likewise, defense counsel's performance was not deficient for "failing to object" to a ruling that was never made.

7. Ineffective Assistance of Counsel for Failing to Present Evidence that Gamboa May Have Suffered Offensive Wounds

Defendant argues his trial counsel was ineffective for failing to introduce evidence that would support an inference that Gamboa suffered offensive wounds to his hands during the altercation with defendant. Specifically, defendant asserts trial counsel failed to elicit testimony from Dr. Jeffrey Gutstadt, the coroner who conducted Gamboa's autopsy, that Gamboa had suffered numerous contusions and abrasions on his hands and arms which Dr. Gutstadt opined "were consistent with an altercation" and "could be either defensive or offensive wounds."¹² Defendant asserts Dr. Gutstadt's testimony would have corroborated defendant's claim that Gamboa was the aggressor

¹² In support of his new trial motion, defendant submitted a sworn declaration executed by Dr. Gutstadt. In his declaration, Dr. Gutstadt observed Gamboa had suffered numerous wounds and abrasions to his hands during his altercation with defendant, which Dr. Gutstadt opined could be either defensive or offensive wounds.

before defendant stabbed him. Defendant has failed to show he was prejudiced by his trial counsel's decision not to introduce Dr. Gutstadt's testimony about the nature of Gamboa's wounds. (See *Crew, supra*, 52 Cal.4th at p. 150.)

First, Dr. Gutstadt's testimony about the nature of Gamboa's wounds would have been cumulative of other evidence suggesting that Gamboa's aggressive behavior was a significant contributing factor that led to the confrontation with defendant. As we discussed above, several neighbors witnessed Gamboa's aggressive and belligerent behavior before and during his altercation with defendant. None of those neighbors testified that defendant solely initiated the confrontation with Gamboa or that Gamboa did not appear to be a willing participant in the two fights between him and defendant. In addition, defendant testified in great detail about the circumstances leading up to the confrontation; defendant clearly portrayed Gamboa as the aggressor.

Second, throughout trial, the People never disputed that Gamboa acted aggressively before and during his encounter with defendant. Nor did the People contend that defendant was the sole instigator of that encounter. As a result, Dr. Gutstadt's testimony would have been, at best, cumulative of a wealth of other evidence that helped establish a factual issue the People did not contest at trial. Accordingly, defendant cannot show that he was prejudiced by counsel's failure to introduce Dr. Gutstadt's opinion about the nature of the wounds to Gamboa's hands and arms. (See *Houston, supra*, 130 Cal.App.4th at p. 295.)

8. The Denial of Defendant's *Batson/Wheeler* Motion

Defendant, who is African-American, challenges the trial court's denial of his *Batson/Wheeler* motion. He contends the

People violated his federal and state constitutional rights when the prosecutor exercised one of his peremptory challenges to excuse an African-American prospective juror. As we explain below, the court properly denied defendant's *Batson/Wheeler* motion.

8.1. Relevant Proceedings

At the beginning of jury selection, the court swore a panel of 55 prospective jurors. After the court excused several prospective jurors for hardship, defendant moved for a new venire, arguing that only two of the remaining prospective jurors were African-American. The court denied defendant's motion. The next day, the court clarified that it disagreed with defendant's claim that only two of the remaining prospective jurors were African-American. The court stated it saw at least three females who were African-American, a fourth female who may be African-American, and one or two males who were African-American.

After the court denied defendant's motion for a new venire, it called 18 members of the panel to the jury box for voir dire. The prosecutor and defendant each exercised three peremptory challenges on the initial 18 prospective jurors who were called to the jury box.

Juror No. 24 was then called into the jury box, where she was assigned seat number 15. Juror No. 24, an African-American woman, worked as a "direct support professional" for people with "behavior developments." She was a single mother of two adult children; her son worked as a longshoreman and her daughter worked for a mentor program in California.

Juror No. 24 had served on a jury in the past, and she believed "[i]t was related to drugs or something like that," but she

couldn't remember whether it was a criminal or civil case. One of her friends went to prison "awhile back" for selling drugs. Juror No. 24 thought that her friend had been treated fairly by law enforcement and the criminal justice system. She stated she wouldn't hold anything against either party in the underlying case based on her friend's experience with the criminal justice system. Juror No. 24 also stated she could vote guilty if the People proved their case against defendant beyond a reasonable doubt, and that she could vote not guilty if the People failed to prove their case. In response to defense counsel's questions, Juror No. 24 stated she would keep an open mind until the end of trial, and she believed she could be fair to both the People and defendant.

When asked by the prosecutor whether she felt that the American criminal justice system was in any way unfair, Juror No. 24 asked the prosecutor to repeat the question. After the prosecutor repeated the question, Juror No. 24 responded, "I really—I don't know, because I don't—I don't know." The prosecutor asked Juror No. 24 if she had "some mixed feelings about that," to which the juror replied, "Because I don't know all of what is taking place, you know. As far as what I know, I guess not, but—I don't know." The prosecutor followed up: "I think you said as far as you know you guess not. So are there parts you feel may not be fair?" Juror No. 24 responded, "That's the part where I really don't know. If I knew more about it, but I don't know that much about it to say if I did or—" The prosecutor replied, "That's fine. Thank you."

Later during the prosecutor's voir dire, Juror No. 24 stated she would be able to hold the People to the same standard of proof regardless of whether she believed the victim was a good

person or a bad person. When asked whether a victim whose behavior contributed to him being attacked by another person should be blamed for the attack, or whether both the victim and the attacker should share the blame, Juror No. 24 stated she believed both parties should share the blame.

The prosecutor then questioned Juror No. 24 about her employment. Juror No. 24 stated she is a “direct support professional” who works with persons with disabilities, including cognitive and mental disabilities. Juror No. 24 stated that she wouldn’t be more sympathetic toward, or judge differently, a person who was on trial based on the fact that that person had a disability or disorder: “No. I have compassion for them, but I don’t think just because they have a disability that I would.”

The prosecutor exercised four more peremptory challenges before using his eighth challenge to excuse Juror No. 24. Defense counsel objected to the prosecutor’s dismissal of Juror No. 24 under *Batson/Wheeler*, noting that he (defense counsel) saw only one remaining African-American prospective juror in the venire. The court concluded that Juror No. 24 was part of a protected class based on her race and stated “it appears there are two remaining African Americans in the venire.”

Defense counsel argued race was a “‘hot button issue’” in defendant’s case due to the “racial makeup of the defendant and the victim.” Defense counsel noted, “I see just one other African American over there in the audience and I don’t think using a comparative analysis here that there’s any articulatable reason for striking this juror other than the fact that she is Black, and we only have, in my mind, one other Black here.”

When the court stated it believed the prosecutor had excused one other African-American prospective juror besides

Juror No. 24, defense counsel stated that it wasn't clear to him or defendant that the prosecutor had excused any other African-American prospective jurors, but that if the prosecutor had, that would further support a prima facie showing of discriminatory intent by the prosecutor to excuse jurors on the basis of race. The prosecutor explained he believed the other prospective juror the court was referring to was Hispanic, and defense counsel stated he believed that juror was "Islander." The court responded, "That's right. Maybe he wasn't African-American."

Defense counsel continued, "My argument is ... it's a combination. ... You have two. You knocked off one. With this small panel that would reflect other than counsel's apprehension about having a Black on the jury—on the panel and that she has passed for cause already." The court noted that it was not yet making a finding that defendant had made a prima facie showing of discriminatory intent, but it allowed the prosecutor to make an offer of proof explaining why he excused Juror No. 24.

The prosecutor responded that he believed the group of prospective jurors who had already been excused represented a wide range of races, including three Caucasians, three Hispanics, and one Asian. The prosecutor then explained that he had asked each prospective juror, including Juror No. 24, about whether the prospective juror believed the criminal justice system was fair. Juror No. 24 had "paused" and "hesitated," asked the prosecutor to repeat the question, and gave responses that caused the prosecutor to think there was something about the criminal justice system with which Juror No. 24 did not agree. The prosecutor noted that he had also excused Juror No. 25 and Juror No. 26 because they had stated they believed the criminal justice system was unfair.

The prosecutor explained he had excused Juror No. 24 for additional reasons. First, the prosecutor was concerned that Juror No. 24 would have difficulty rationally processing defendant's "P.T.S.D. defense" due to the fact that she worked with people with behavioral disabilities. The prosecutor believed Juror No. 24 could potentially be sympathetic toward defendant because "she is working with those who have disorders or disabilities." Second, the prosecutor noted that Juror No. 24 had a friend who was in prison, although it was unclear how close she was to that friend.

The court denied defendant's *Batson/Wheeler* motion. The court found that defendant did not make a prima facie showing that the prosecutor had excused Juror No. 24 for discriminatory reasons. The court explained that even had defendant made a prima facie showing, it nevertheless found the prosecutor dismissed Juror No. 24 for nondiscriminatory reasons: "[Juror No. 24] did have trouble with the criminal justice system and its operations, and she did express potential sympathies or issues even though she said she would not be sympathetic. So I think there are valid reasons to justify a peremptory as to this juror."

8.2. Applicable Law

The use of peremptory challenges to exclude prospective jurors on the sole ground of bias "against an identifiable group distinguished on racial, religious, ethnic, or similar grounds" violates the equal protection guarantees of the Fourteenth Amendment to the United States Constitution as well as a defendant's "right to [a] trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the state Constitution." (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1157–1158 (*Gutierrez*).) "Exclusion of even one

prospective juror for reasons impermissible under *Batson* and *Wheeler* constitutes structural error, requiring reversal.” (*Id.* at p. 1158.)

When a defendant claims the People “ha[ve] improperly discriminated in the exercise of peremptory challenges, the court and counsel must follow a three-step process.” (*Gutierrez, supra*, 2 Cal.5th at p. 1158.) At the first step, the defendant must demonstrate a prima facie case by showing the totality of the relevant facts gives rise to an inference of discriminatory purpose. (*Ibid.*) The defendant “satisfies this first step by producing ‘evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.’” [Citations.]” (*Ibid.*)

Among the types of evidence relevant to determining whether a prima facie case of discrimination exists “are that a party has struck most or all of the members of the identified group from the venire, that a party has used a disproportionate number of strikes against the group, that the party has failed to engage these jurors in more than desultory voir dire, that the defendant is a member of the identified group, and that the victim is a member of the group to which the majority of the remaining jurors belong. [Citation.] A court may also consider nondiscriminatory reasons for a peremptory challenge that are apparent from and ‘clearly established’ in the record [citations] and that necessarily dispel any inference of bias.” (*People v. Scott* (2015) 61 Cal.4th 363, 384 (*Scott*)). Where “‘a trial court denie[s] a [*Batson/Wheeler*] motion because it finds no prima facie case of group bias was established, the reviewing court considers the entire record of voir dire. [Citation.] “If the record ‘suggests grounds upon which the prosecutor might reasonably

have challenged’ the jurors in question, we affirm.” ’ [Citations.]” (*People v. Panah* (2005) 35 Cal.4th 395, 439.)

Once the defendant makes a prima facie showing of discrimination, the burden shifts to the People “to give an adequate nondiscriminatory explanation for the challenges. To meet the second step’s requirement, the [prosecution] must provide ‘a “clear and reasonably specific” explanation of his “legitimate reasons” for exercising the challenges.’ [Citation.]” (*Gutierrez, supra*, 2 Cal.5th at p. 1158.)

Third, if the prosecution tenders a race-neutral explanation, “the trial court must decide whether the movant has proven purposeful discrimination.” (*Gutierrez, supra*, 2 Cal.5th at p. 1158.) “This portion of the *Batson/Wheeler* inquiry focuses on the subjective genuineness of the reason, not the objective reasonableness.” (*Ibid.*) To ensure the prosecution’s explanation is genuine, the judge “must make ‘a sincere and reasoned attempt’ to evaluate the prosecutor’s justification... .” (*Id.* at p. 1159.)

Where, as here, “(1) the trial court has determined that no prima facie case of discrimination exists, (2) the trial court allows or invites the prosecutor to state his or her reasons for excusing the juror for the record, (3) the prosecutor provides nondiscriminatory reasons, and (4) the trial court determines that the prosecutor’s nondiscriminatory reasons are genuine, an appellate court should begin its analysis of the trial court’s denial of the *Batson/Wheeler* motion with a review of the first-stage ruling.” (*Scott, supra*, 61 Cal.4th at p. 391.) If the reviewing court agrees “with the trial court’s first-stage ruling, the claim is resolved.” (*Ibid.*) If the reviewing court disagrees, it “can proceed directly to review of the third-stage ruling, aided by a full record

of reasons and the trial court's evaluation of their plausibility.”
(*Ibid.*)

“Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. [Citation.] ‘We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges “ ‘with great restraint.’ ” [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]’ [Citation.]” (*People v. Lenix* (2008) 44 Cal.4th 602, 613–614, fn. omitted.)

8.3. The Trial Court Properly Denied Defendant's *Batson/Wheeler* Motion

Defendant argues the court erred in denying his *Batson/Wheeler* motion because he made a prima facie showing that the prosecutor had discriminatory reasons for excusing Juror No. 24. Specifically, defendant contends he made a prima facie showing of discriminatory intent by pointing out that the prosecutor had struck one of only two African-American prospective jurors in the entire jury pool and because Juror No. 24's responses during voir dire gave the prosecutor no reason to strike her “other than her race.” Defendant further argues the prosecutor's proffered reasons for excusing Juror No. 24 were pretextual because the juror never stated she did not believe the criminal justice system was unfair or that she would be sympathetic toward defendant due to the nature of her work as a

support professional for people with cognitive and behavioral disabilities and the fact that defendant suffered from PTSD. As we explain, the court properly denied defendant's motion.

While it is true that the use of a peremptory challenge to exclude only a single prospective juror on the basis of race or ethnicity is a constitutional error requiring reversal (see *Gutierrez, supra*, 2 Cal.5th at p. 1158), a prima facie case is not established merely by showing the excluded juror was a member of a cognizable group. (*People v. Bonilla* (2007) 41 Cal.4th 313, 343 (*Bonilla*); *People v. Bell* (2007) 40 Cal.4th 582, 598 (*Bell*), disapproved on other grounds by *People v. Sanchez* (2016) 63 Cal.4th 665, 687, fn. 13.) Rather, "in drawing an inference of discrimination from the fact one party has excused 'most or all' members of a cognizable group [citation], a court finding a prima facie case is necessarily relying on an apparent pattern in the party's challenges." (*Bell*, at p. 599, fn. 3.) "Such a pattern will be difficult to discern when the number of challenges is extremely small." (*Bonilla*, at p. 343, fn. 12.)

In *Bonilla*, for example, the prosecutor struck the only two African-American prospective jurors in a 78-person juror pool. (*Bonilla, supra*, 41 Cal.4th at p. 342.) The California Supreme Court held that the "'small absolute size of this sample'" made it impossible to draw an inference of discrimination based solely on the fact that the People struck the only two African-American prospective jurors in the juror pool. (*Id.* at p. 343.) While the court acknowledged that the exclusion "'of a single prospective juror may be the product of an improper group bias,'" it reasoned that, "'[a]s a practical matter, ... the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion.'" [Citations.] (*Ibid.*; see also *People v. Howard* (2008)

42 Cal.4th 1000, 1018, fn. 10 (*Howard*) [“The challenge of one or two jurors, standing alone, can rarely suggest a pattern of impermissible exclusion.”].) Similarly, in *Bell*, the Supreme Court applied the same rationale in rejecting the defendant’s argument that the prosecutor’s excusal of two of the three African-Americans in the jury pool established a prima facie case of discriminatory intent. (See *Bell, supra*, 40 Cal.4th at pp. 597–598.)

Here, the prosecutor’s use of a peremptory challenge to excuse one of only two African-Americans in the juror pool was, by itself, insufficient to establish a prima facie case of discriminatory intent. In addition, defendant has not shown that the prosecutor used a disproportionate amount of his peremptory challenges on African-American prospective jurors. The prosecutor used his eighth peremptory challenge to excuse Juror No. 24, and up until that point in the jury selection process, the prosecutor had not used any of his peremptory challenges to excuse an African-American prospective juror. (See *Bell, supra*, 40 Cal.4th at p. 598 [the prosecutor did not use a “‘disproportionate number’” of his peremptory challenges against a protected group when he used two of his 16 challenges, or one-eighth of his challenges, to excuse African-American prospective jurors].)

Because defendant did not make a prima facie showing of race discrimination, the court properly denied defendant’s *Batson/Wheeler* motion. In light of this conclusion, we need not engage in comparative juror analysis or conduct a review of the court’s determination that the prosecutor’s proffered nondiscriminatory reasons for excusing Juror No. 24 were genuine. (See *Howard, supra*, 42 Cal.4th at p. 1020 [a reviewing

court does not need to conduct a comparative juror analysis if it concludes the trial court correctly found the defendant failed to make a prima facie showing of racial discrimination].)

9. Cumulative Error

Finally, defendant argues the cumulative effect of the trial court's alleged evidentiary errors and trial counsel's alleged deficiencies warrants reversal of his conviction for second degree murder. "Under the cumulative error doctrine, the reviewing court must 'review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence.' [Citation.] When the cumulative effect of errors deprives the defendant of a fair trial and due process, reversal is required." (*People v. Williams* (2009) 170 Cal.App.4th 587, 646.)

It is not reasonably probable the jury would have reached a more favorable verdict in the absence of any combination of the alleged omissions by trial counsel and the court's alleged evidentiary errors. As we have already discussed, overwhelming evidence supports defendant's conviction for second degree murder. Moreover, all of the evidentiary errors defendant has raised concern issues that were either collateral to the issue of guilt or that were independently established through properly admitted evidence. Accordingly, we find no denial of due process as the result of cumulative error. (See *People v. Grimes* (2016) 1 Cal.5th 698, 737.)

DISPOSITION

The judgment is affirmed. Upon issuance of the remittitur in this case, the court is directed to correct the abstract of judgment by deleting the description of defendant's conviction as one involving willful, deliberate, and premeditated murder, and replacing it with second degree murder, and to send a certified copy of the corrected abstract of judgment to the California Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.